UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOYCE ROBINSON, Plaintiff, v. CONSOLIDATED RAIL CORPORATION (a Pennsylvania Corporation licensed to do business in New Jersey); NORFOLK SOUTHERN CORP., NORFOLK SOUTHERN RAILROAD CORP., JOHN DOES (1-10), AND ABC CORPORATION (1-10), Defendants.	:	Civil Action No.: 1:07-cv-1641 (Yvette Kane, U.S.D.J.) *Filed Electronically*

DEFENDANTS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THEIR MOTION TO DISMISS

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PRELIMINARY STATEMENT

Defendants Norfolk Southern Railway Company (incorrectly captioned as "Norfolk Southern Railroad Corp.") and Norfolk Southern Corp. ("Norfolk Southern"), collectively "defendants," submit this reply memorandum in further support of their motion to dismiss the Complaint filed by plaintiff Joyce Robinson.

Since the underlying motion was initially filed in July 2007, plaintiff has voluntarily dismissed her claims against Consolidated Rail Corporation ("Conrail") and agreed to the transfer of this matter to this District. Additionally, plaintiff's opposition brief acknowledges that the New Jersey Law Against Discrimination ("NJLAD"), N.J.S.A. 10:5-1, *et seq*. does not apply to her claims, and concedes that Count Eight must be dismissed. (Pl. Br. at 12-13). Consequently, defendants will address in reply only the remaining claims.

Plaintiff's opposition to the motion to dismiss fails completely to address the grounds presented by defendants for dismissal of her Complaint. Plaintiff offers neither legal nor factual bases for denial of the motion to dismiss.[1] Plaintiff's submission demonstrates the lack of merit to the claims in her Complaint and,

[1] In opposition to defendants' motion to dismiss, on August 28, 2007, plaintiff electronically filed with the District of New Jersey two (2) copies of her brief. The following day, August 29, 2007, plaintiff *served* on defendants' counsel both the filed Brief and a Certification of Plaintiff with Exhibits. Defendants will address the arguments raised in both plaintiff's Brief and the un-filed Certification, and will leave it to the Court to determine whether plaintiff's un-filed Certification should be considered.

indeed, supports defendants' motion to dismiss. Plaintiff does not oppose defendants' motion. She talks past it.

For the reasons set forth in defendants' opening brief and those addressed briefly herein, the claims set forth in plaintiff's Complaint are devoid of merit and must, therefore, be dismissed.

ARGUMENT IN REPLY

A. Plaintiff's FELA Claim Must Be Dismissed.

1. Plaintiff Fails to State a Claim Under FELA.

Plaintiff's First Count asserts a violation of the Federal Employers' Liability Act ("FELA"). However, plaintiff fails to allege -- either in her Complaint or in her un-filed Certification -- any facts sufficient to support her FELA claim. Plaintiff's FELA claim asserts that she suffered psychological harm as a result of alleged discriminatory acts in the workplace. Those allegations do not state a FELA claim.

Plaintiff acknowledges in her brief that FELA provides the exclusive remedy for a railroad employee injured as a result of her employer's negligence. (Pl. Br. at 7). She further acknowledges that she must prove that her employer was negligent. (*Ibid*.). Plaintiff, however, completely misapprehends defendants' original arguments calling for dismissal of her First Count.

An injured worker cannot recover under FELA for negligent infliction of emotional distress unless he or she was in the "zone of danger." *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 554 (1994). The "zone of danger" test "limits recovery for emotional injury to those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct." *Id.* at 547-48 (further noting "a near miss may be as frightening as a direct hit") (quotation omitted). As the Court made clear,

> Under this test, a worker within the zone of danger of physical impact will be able to recover for emotional injury *caused by fear of physical injury to himself*, whereas a worker outside the zone will not. Railroad employees thus will be able to recover for injuries -- physical and emotional -- caused by the negligent conduct of their employers *that threatens them imminently with physical impact…*

Id. at 556 (emphasis added). Under the zone of danger test, the employee must have been threatened with immediate physical traumatic harm. *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 428-38 (1997).

Applying this precedent to plaintiff's First Count, plaintiff cannot recover unless she was either (a) physically injured or (b) placed in imminent danger of being seriously physically injured. *See Gottshall*, 512 U.S. at 557-58 (dismissing FELA emotional-injury claim for work-related stress due to substandard-working conditions; remanding for reconsideration under zone-of-danger test FELA emotional injury claim of employee who witnessed co-worker's death); *Bloom v.*

Consol. Rail Corp., 41 F.3d 911, 917 (3rd Cir. 1994) (dismissing, under zone of danger test, FELA emotional-injury claim of railroad engineer whose train struck pedestrian, because plaintiff "was neither placed in immediate risk of physical harm nor threatened imminently with physical impact"); *Ferguson v. CSX Transp.*, 36 F. Supp. 2d 253 (E.D. Pa. 1999) (dismissing FELA emotional distress claims based on off-duty incident where co-worker screamed threats and threw rocks; employee was not hit by rocks and emotional distress related not to fear of imminently being hit by rocks but to co-worker's threats of future harm); *Allen v. Nat'l R.R. Passenger Corp.*, 90 F. Supp. 2d 603 (E.D. Pa. 2000) (dismissing railroad employee's claims for negligently and intentionally inflicted emotional distress under FELA, notwithstanding plaintiff's assertion that alleged harasser physically touched her, because plaintiff neither suffered sufficient physical impact nor was she in zone of danger thereof); *Gannon v. Nat'l R.R. Passenger Corp.*, 422 F. Supp. 2d 504 (E.D. Pa. 2006) (dismissing railroad employee's claims for negligently and intentionally inflicted emotional distress under FELA because plaintiff neither suffered physical impact nor was he in zone of danger).

Here, plaintiff does not allege that her emotional distress arose from a physical injury negligently caused by defendants. Nor does she allege her emotional distress arose from a "near miss" or that defendants' negligence placed her in immediate risk of traumatic physical harm. Rather, plaintiff alleges that her emotional distress arose from incidents of gender or racial discrimination -- all of which involved allegedly disparate treatment or verbal statements, and none of which involved physical conduct. Indeed, the only "physical" incidents were alleged acts of vandalism to plaintiff's car, which she does not allege she even witnessed. Plaintiff points to no decision finding that a victim of discrimination was within the zone of danger under FELA. That is because the law does not support such an application of the zone of danger test.

Plaintiff's FELA claim fails as a matter of law and her First Count must be dismissed.

2. Plaintiff's FELA Claim is Time-Barred.

Even if plaintiff had stated a claim for relief under FELA, her claim still would be time barred. FELA's three-year limitations period bars plaintiff's First Count because the latest event underlying this claim occurred on March 19, 2004, when plaintiff alleges someone vandalized her car, scrawling "KKK" and "White Power" on the doors. The Complaint in this action was not filed until April 4, 2007. Thus, her Complaint was filed outside the three-year period.

Plaintiff tries to resuscitate this stale claim based on the theory that it was not until late 2005 that she "discovered" that her alleged emotional injury was caused by the March 19, 2004 incident or by prior events, which span the period from 1997 to 2004. (Pl. Br. at 6-7). That allegation does not help her because it is not in her Complaint and, in any event, it is completely contradicted by plaintiff's own sworn statement to the Pennsylvania Human Relations Commission ("PHRC").

This is not the case of a poorly drafted Complaint that can easily be amended to cure the statute of limitations issue. To the contrary, plaintiff is precluded from asserting her new "discovery" theory because she has previously contradicted herself under oath. In her September 2003 charge of discrimination she alleged that "ongoing harassment *has affected my health*." (PHRC Case No. 200301806/EEOC No. 17FA460923, dated September 25, 2003, at ¶ 20).[2] Thus, it is clear from plaintiff's own sworn words that she already knew in September 2003 that her alleged injuries were due to the alleged discrimination.

Plaintiff now seeks to contradict her earlier sworn filing with an (un-filed) Certification in which she claims that she suffered a nervous breakdown in or about November 2004 and that was "the first time [she] noticed [she] was having psychological problems." (Pl. Cert., ¶ 13). She further avers that she did not connect her "physical and mental injuries and damages" to the alleged work-related incidents until "in or about late 2005, upon my separation from railroad employment." (*Id*., ¶ 14).

[2] A true and correct copy of this charge of discrimination is attached as Exhibit A to the Declaration of Christopher J. Dalton, submitted and filed herewith.

This most recent assertion -- that it took plaintiff 18 months after the last alleged incident of discrimination, a year after her nervous breakdown, and months after her termination to "discover" her alleged injuries were connected to employment-related events -- is a thinly veiled attempt to avoid the FELA statute of limitations and should be rejected out of hand. *See, e.g., Martin .v Merrell Dow Pharmaceuticals*, 851 F.2d 703, 706 (3d Cir. 1988) (courts may reject sham affidavits which inexplicably contradict prior sworn statements) (citation omitted); *Jiminez v. All Am. Rathskeller, Inc.*, 2006 WL 1548874, at *4 (M.D. Pa. June 2, 2006) (same). Plaintiff here offers no explanation for her contradictory statements which, quite clearly, are intended to help her avoid the limitations issue she now faces. Her claim that she did not attribute her injuries to the alleged incidents until 2005 simply defies common sense given that the last alleged incident was one in which "KKK" and "White Power" were scrawled on plaintiff's car -- patently racist words which would not lie latent in one's mind.

And, even if plaintiff's (un-filed) Certification is not disregarded, her claim nonetheless fails under the discovery rule upon which she relies. As plaintiff posits, the statute of limitations on her FELA claim commenced running when she should reasonably have been aware of her injuries and their possible causes. (Pl. Br. at 6). In *Urie v. Thompson*, 336 U.S. 163 (1949), the Supreme Court held that a cause of action accrues when the injury manifests. In *United States v. Kubrick*, 444 U.S. 111 (1979), the Court held that the limitations period begins to run when the plaintiff is in possession of facts which indicate she has been injured and the cause of the injury.

But the equitable tolling provided by the "discovery rule" is entirely inapplicable here, because there was nothing for plaintiff to "discover." Plaintiff clearly asserted in her September 2003 PHRC charge that she had been injured -- and her health had suffered -- due to alleged on-going discrimination and harassment. She repeats many of those allegations in this lawsuit. That additional incidents may allegedly have occurred after September 2003 -- the last one being March 2004 -- is immaterial: as of September 2003 plaintiff knowingly asserted that her health had been damaged due to alleged acts of discrimination and harassment. Plaintiff's claims accrued and the clock started running in September 2003, and though it may have extended through and until the last alleged event in March 2004, her Complaint in this action was not filed until April 2007 -- more than three years after the last alleged event. Plaintiff's current attempt to make an end-run around the statute of limitations should be seen for the dodge that it is.

B. The Railway Labor Act Preempts Counts Three, Four, and Five Because They Necessitate Interpretation of a Collective Bargaining Agreement.

Defendants have moved pursuant to Fed. R. Civ. P. 12(b)(1) to dismiss, for lack of subject matter jurisdiction, Counts Three (alleging wrongful discharge), Four (alleging breach of contract), and Five (alleging breach of implied contractual covenant of good faith and fair dealing). Plaintiff argues in opposition that these Counts should not be dismissed because she needs discovery. (Pl. Br. at 8-10). This argument is unavailing.

As fully explained in defendants' moving brief, plaintiff's challenge of her termination -- by way of her wrongful discharge, breach of contract, and breach of the covenant of good faith and fair dealing claims -- is a "minor dispute" for which the Railway Labor Act mandates arbitration, not litigation. Plaintiff could and did arbitrate her grievance. Consequently, having done so, and having no grounds to appeal that arbitral determination (and having not even attempted to do so), she cannot now re-grieve her termination in the courts. *As a matter of law*, which no facts from discovery can change, the Railway Labor Act precludes plaintiff from pursuing these claims. Her opposition does not cite any authority, nor does it even assert any argument, to the contrary.

Because plaintiff has failed to demonstrate any basis for denial of the motion to dismiss her Third, Fourth, and Fifth Counts, defendants rest upon the arguments set forth in their opening brief (Defs. Br. at 10-15).

C. Plaintiff's Claims for Intentional Infliction of Emotional Distress and Negligent Infliction of Emotional Distress are Time-Barred.

Count Six of plaintiff's Complaint asserts a claim for intentional infliction of emotional distress ("IIED"). Count Seven of plaintiff's Complaint asserts a claim for negligent infliction of emotional distress ("NIED"). Defendants have moved to dismiss the IIED and NIED claims as time-barred. Plaintiff does not dispute that these claims are subject to a two-year limitations period, but simply reiterates her argument that she did not discover the emotional distress until some 18 months after the last incident of alleged maltreatment occurred on March 19, 2004.

Under Pennsylvania law, the discovery rule only tolls the statute of limitations "'[i]n those circumstances where the plaintiff cannot reasonably be expected to be aware of the injury or of its cause.'" *Watson v. City of Philadelphia*, 2006 WL 2818452 at *2 (E.D. Pa. Sept. 28, 2006) (quoting *Haggart v. Cho*, 703 A.2d 522, 525 (Pa. Super. Ct. 1997)). Thus, the statute of limitations begins to run when the injured party reasonably "possess[es] sufficient critical facts to put him [or her] on notice that a wrong has been committed and that he [or she] need investigate to determine whether he [or she] is entitled to redress." *Thompson v. AT&T Corp.*, 371 F. Supp. 2d 661, 682 (W.D. Pa. 2005) (applying Pennsylvania's statute of limitations and discovery rule to IIED claim) (citation omitted).

The alleged events that form the basis of plaintiff's IIED and NIED claims span the period 1997 through March 19, 2004. Here, there can be no question that plaintiff knew or should have known that a wrong had been committed sometime on or before March 19, 2004, when she allegedly saw that someone had scratched "KKK" and "White Power" into the sides of her car. Plaintiff's new-found discovery theory fails, as a matter of law, to save her claim. *Watson*, 2006 WL 2818452 at *3 (granting defendants' motion for judgment on the pleadings and dismissing IIED claim because there was no evidence "that could lead this court to conclude [plaintiff] was unable to recognize the alleged wrong or the resulting injury" when it first occurred).

D. Plaintiff's Negligent Infliction of Emotional Distress Claim is Precluded By FELA.

Although plaintiff's NIED claim is time-barred, even if it were not, the claim is precluded by FELA. Plaintiff's argument in opposition to dismissal of her NIED claim (Count Seven) is a complete non-sequitur. (Pl. Br. at 11-12). While acknowledging that her NIED claim is subject to FELA's "zone of danger" test -- even quoting from the Supreme Court's *Gottshall* decision -- she fails to address that FELA provides the exclusive remedy for a railroad employee injured as a result of her employer's negligence. (*See* Def. Br. at 16-17).

Defendants do not assert, as plaintiff apparently believes they do, that plaintiff cannot bring a claim for NIED. Plaintiff can allege any sort of negligence claim she likes, but any negligence claim she asserts against her railroad employer, such as defendants, is governed by FELA -- in much the same way that a negligence claim by a non-railroad employee against her employer is governed by the applicable workers' compensation statute.[3] Therefore, because plaintiff's NIED claim sounds in negligence, and because FELA is her exclusive remedy for any negligence claim against defendants, this claim is preempted by, and subsumed within, her FELA claim. Count Seven must be dismissed.

E. Plaintiff's Claim for Intentional Infliction of Emotional Distress is Preempted.

Alternatively, if the IIED claim is not dismissed as time-barred (which it is), plaintiff has failed completely to address the fact that the IIED claim is preempted under the Railway Labor Act. Because this claim implicates defendants' conduct in connection with the terms and conditions of plaintiff's employment, resolution of this claim would require interpretation of the CBA and would be preempted by the RLA. Plaintiff has failed to demonstrate any basis for denial of the motion to dismiss her Sixth Count, alleging IIED, on preemption grounds, and defendants rest upon the arguments set forth in their opening brief (Defs. Br. at 16 n.7). Plaintiff's IIED claim must be dismissed.

F. Plaintiff's Title VII Termination Claim Fails Because She Has Failed To Exhaust Her Administrative Remedies.

Defendants originally moved for dismissal of plaintiff's entire Title VII claim on the grounds that plaintiff had no right to sue letter. In opposition to defendants' motion, plaintiff submitted right to sue letters regarding charges of alleged hostile work environment prior to September 2003 (Dalton Dec., Ex. A), and alleged discriminatory suspension and retaliation prior to August 2004. (Dalton Dec., Exs. B and C).[4] In light of plaintiff's submissions, defendants no longer seek dismissal of plaintiff's Title VII claim to the extent it involves the allegations plaintiff included in those charges filed in 2003 and 2004. However, defendants continue their motion to dismiss plaintiff's Title VII claim for discriminatory termination because plaintiff has no right to sue letter for any charge based on that claim.

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[3] While FELA is not a regimented compensatory scheme like workers' compensation, it is analogously the sole avenue for relief available to this plaintiff.

As fully explained in defendants' moving brief, an employee intending to sue her employer under Title VII must first exhaust her administrative remedies by filing a charge with the EEOC or a complimentary state agency and receiving a right-to-sue letter from that agency. *See* 42 U.S.C. § 2000e-5(f)(1); *Foster v. JLG Industries*, 372 F. Supp. 2d 792, 802 (M.D. Pa. 2005) (filing of charge and receipt of right-to-sue letter are mandatory pre-requisites); *Robinson v. Dalton*, 107 F.3d 1018, 1020 (3rd Cir. 1997) (same).

Plaintiff here has no right to sue letter based on any charge of discrimination arising from the termination of her employment. She claims that the PHRC "either has or is about to memorialize in writing a probable cause finding" on her

[4] The right to sue letters are appended as Exhibit B to plaintiff's (un-filed) Certification.

termination-based charge. (Pl's Cert., ¶ 15).[5] Plaintiff's belief does not change the fact that she has no right to sue letter in connection with her termination claim.[6] Thus, her Title VII claim as to her termination must be dismissed, at the very least, without prejudice to be renewed if plaintiff can produce the right to sue letter she claims is forthcoming.

G. Counts Ten and Eleven, Which Repeat Plaintiff's Claims Against Defendants As Against Anonymous Defendants, Fail Because Plaintiff's Other Claims Lack Merit.

Finally, as set forth in defendants' opening brief, and as unopposed by plaintiff, Counts Ten and Eleven of plaintiff's Complaint must also be dismissed because they simply repeat, as against anonymous defendants, her other meritless counts.

[5] Plaintiff refers to a "retaliation" charge for which she expects a right to sue letter. The charge to which she refers therein is her termination charge; it is not just a retaliation charge. (Persichia Decl. Ex. C).

[6] Nor can plaintiff argue that her termination claims were "fairly within the scope" of her prior charges for which she has right to sue letters. *See Antol v. Perry*, 82 F.3d 1291, 1295 (3d Cir. 1996). Such an argument would be futile because it would be impossible for plaintiff's termination to be within the scope of charges that were filed years before that termination. Moreover, those charges related to claims for hostile work environment and discriminatory treatment. Indeed, plaintiff herself recognized that the termination requires its own charge, as she filed a *separate* charge of discrimination relating to it.

CONCLUSION

For all the reasons stated above, as well as those set forth more fully in defendants' opening brief, the Complaint should be dismissed, in its entirety, with prejudice.

Respectfully submitted,

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Dated: September 21, 2007

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CERTIFICATE OF COMPLIANCE

I hereby certify that in accordance with Local Civil Rule 7.8(b)(2), this brief contains 3,418 words, including footnotes, but excluding the cover and tables of contents and authorities, calculated using Microsoft Word's "Word Count" feature.

/s/ Christopher J. Dalton
Christopher J. Dalton

Dated: September 21, 2007

CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of this brief and the supporting Declaration of Christopher J. Dalton were transmitted via overnight courier to:

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Dated: September 21, 2007